United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1675

United States Court of Appeals

For the Second Circuit

Docket No. 74-1675

IBERIAN TANKERS CO.,

Plaintiff-Appellee,

against

GATES CONSTRUCTION CORP.,

Defendant-Appellant.

BRIEF OF APPELLANT

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UNITED STATES COURT OF APPEALS
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Statement of Issue for Review

The singular issue presented to this Court for review is whether or not Judge Knapp in the exercise of what he termed the Court's "*legal* discretion" (28a)* chose the right line when he awarded to the plaintiff pre-judgment interest, even though such a determination violated his "innate sense of the fitness of things" (28a). He stated that he would "be inclined to deny plaintiff's claim for interest in order to ameliorate somewhat the harsh American rule that division of damages must be equal without reference to the degree of fault" (28a), but for the fact that he construed his discretionary powers otherwise curtailed.

The Lower Court apparently felt so uncertain of its conclusion that it was impelled to state:

> "* * * However, as the question does not seem free of doubt, the Court will set forth its reasoning in

* Reference is to page of Appellant's Appendix.

some detail so that adequate appellate relief can be assured." (27a/28a)

Appellant submits that to charge the defendant with pre-judgment interest, where the plaintiff has "just about borne" the burden of proving negligence (21a) in a situation where had the plaintiff's vessel been proceeding at a safe speed the danger could have been avoided (24a) and where the plaintiff was guilty of "substantial negligence" (27a) is innately unfair and violative of the basic equitable principles of admiralty jurisprudence.

Having been burdened with the harsh division of damages rule, where defendant's fault was virtually passive and certainly to a substantial extent less than 50 percent, an award of pre-judgment interest is tantamount to a punitive adjudication. The judgment of the Lower Court in this respect should be reversed.

The Facts

Notwithstanding the fact that the appeal herein is limited to the Lower Court's determination in respect of pre-judgment interest, it is important that this Court's attention be directed to the fact that the defendant's fault was modest and the plaintiff's negligence substantial (27a). The finding of negligence on the part of the defendant was based on the determination that "defendant's servants gave no thought to exploring the possibility of alternative routes which would have avoided exposing the buoy to danger" (25a). On the other hand, the Trial Court found that the plaintiff's vessel "was proceeding at an excessive speed" (26a) and that "had the ship been proceeding at a safe speed the danger could have been avoided" (24a). In substance, Judge Knapp found that the WAPELLO *would not have stranded had the vessel been navigating with the degree of caution which would be con-*

sidered reasonable in the circumstances. In such a setting, were it appropriate to apply the rule of proportionate fault, rather than the admiralty rule of divided damages, the monetary recovery which plaintiff would enjoy from defendant would have been substantially less than that obtained. Having been thus rewarded, notwithstanding its culpable fault, to grant pre-judgment interest is violative of every principle of equity. Further, it is inapposite to prior holdings of this Court.

POINT I

The Court below misconstrued its discretionary powers and failed to apply equitable principles.

Since the very beginning of admiralty jurisprudence it has been well recognized that the function of an Admiralty Court, more than the implementation of any other separate body of law, is to do equity. This is true from a jurisdictional as well as a substantive standpoint.

The Court below, in misconstruing its implicit discretionary powers under the misguided view that it was controlled or otherwise pre-empted by the view expressed in *The Wright,* 109 F. 2d 702, and adopting the opinion in *Ore Carriers of Liberia, Inc.* v. *Navigen Co.,* 305 F. Supp. 895, aff'd. 435 F. 2d 549 (2d Cir. 1970), concluded that it was *compelled* to award pre-judgment interest to the plaintiff.

In the present case, where plaintiff's vessel stranded, substantially due to its own negligence, the Court having found, "* * * that plaintiff's negligence was more clearly established than defendant's * * *" (28a), the casualty not arising as a result of collision, the Court nonetheless invoked the admiralty mutual fault collision rule and held that plaintiff was entitled to recover 50 percent of its damages. It then attempted to equate its reasoning for

awarding pre-judgment interest on the ground that defendant's flotilla, having sustained no damage, there being no collision situation, made no claim against plaintiff's vessel. The conclusion reached cannot stand the test of logic for it rests on an improper premise (no collision having occurred) and the result is wholly inequitable.

Had the Court applied its own sound discretion, the claim for pre-judment interest would have been denied (28a).

POINT II

In admiralty pre-judgment interest is not awarded where the casualty was a result of mutual fault.

Notwithstanding the basic principles of equity and justice which should influence the exercise of the Court's discretion, it is the usual admiralty rule in this Circuit that *in mutual fault cases* (normally arising as a result of collision) interest runs from the date of the decree, *Triangle Cement Corp.* v. *Towboat Cincinnati* (S.D.N.Y., 1967), 280 F. Supp. 73, affirmed *per curiam* (2d Cir. 1968), 393 F. 2d 936. In that case the District Court held, at p. 77 of its opinion, citing *Lady Nelson, Ltd.* v. *Creole Petroleum Corp.* (2d Cir. 1961), 286 F. 2d 684 and *Afran Transport* v. *Bergchief* (2 Cir. 1960), 285 F. 2d 119:

> "* * * the court, in the exercise of its discretion, has denied plaintiff's application for interest from April 12, 1963, the date of the collision. *While the* WALLACE *was the only vessel to sustain damage, she was at fault* in not being equipped to carry proper lights. *Had she been so equipped, there is no reason to believe that the collision would have occurred.* The negligence on the part of the CINCINNATI and the TURECAMO does not provide a sufficient basis for departing from *the usual rule that interest commences*

to run from the date of the final decree." (emphasis supplied)

The quoted language in the above-cited case is destructive of the reasoning of Judge Metzner in *Ore Carriers of Liberia* v. *Navigen Co., supra* (were that case not otherwise distinguishable, infra p. 7), for it is stated that in the *Triangle Cement Corp.* case, *supra* "• • • the WALLACE was the only vessel to sustain damage, • • •". It is not, therefore, a condition precedent to denying interest that there be claims by both vessels and this proposition has been approved by the Second and Fifth Circuits.

See also, *Mormacguide-Portmar,* 1967 A.M.C. 525 (not otherwise reported), and particularly the Fifth Circuit's view as expressed in *Dow Chemical* v. *Dixie Carrier* (5th Cir. 1972), 463 F. 2d 120, a mutual fault case, where it was held that the Trial Court was correct in granting *interest from the judgment date* where serious and genuine legal and factual issues were present.

Similarly, and consistent with the general rule, in *Chitty* v. *M/V Valley Voyager* (5th Cir. 1969), 408 F. 2d 1354, where a harbor tug lashed to the side of a large river pushboat was caused to capsize and sink as the vessels rounded a bend in the Mississippi River, the Court held that both vessels were at fault and that since the sinking of the tug was *due to the mutual fault* of the tug master and the captain of the pushboat to which the tug was tide, *the Court properly awarded interest from the date of the judgment* rather than from the date of the accident. In that case there was no damage to the defendant's vessel. To the same effect, *Kawasaki Zosensho* v. *Cosulich Societa Triestina Di Navigazione* (5th Cir. 1926), 11 F. 2d 836.

The weight of authority, as well as the proper exercise of discretion, dictates that pre-judgment interest be denied and the opinion of the Court below should be reversed.

POINT III

The authority cited by the court below is inapposite and unrelated.

The strict construction which Judge Knapp placed upon the language employed in the 1940 opinion of Judge Clark in *The Wright, supra,* is, we suggest, entirely unjustified. In the setting of that case, where the appellant was successful in reversing a holding of the District Court which awarded the United States interest on its damages and denied interest against the United States on the damages sustained by a private vessel owner, the Court of Appeals made reference to certain precedents where the element of interest was at issue. After discussing the statutory circumstances having to do with interest vis-a-vis the United States, Judge Clark commented:

> "• • • precedents, however, support the power of the admiralty court to withhold interest under circumstances analogous to those present here." (p. 701)

Admittedly, the Court confirmed that an award of interest in admiralty is a matter of discretion and ought to be awarded "unless there are exceptional circumstances to justify refusal." Although Judge Clark cited two instances where such refusal would be appropriate, i.e.—unreasonable delay and situations of divided damages as a result of joint fault [*The Wright* was a mutual fault collision case], it cannot be said that the Court intended to teach us that in all other cases interest *must* be awarded. Indeed, were that the case, subsequent rulings of this and other Courts would have to be condemned as contrary to the "teaching of *The Wright*" (28a).

We would then be compelled to say that this Court was wrong in 1968 when it affirmed Judge Bonsal in *Triangle*

Cement, supra, and was wrong in the 1961 case of *Lady Nelson, supra,* as well as the 1960 case of *Afran Transport, supra.* Must we also condemn the Fifth Circuit for their agreement in the 1972 case of *Dow Chemical* v. *Dixie Carrier, supra,* that the Trial Court was justified in denying pre-judgment interest? If so, it would follow that the Fifth Circuit was wrong again in *Chitty* v. *M/V Valley Voyager, supra,* when pre-judgment interest was denied a party who sustained damage as against one who had no damage, where the former's negligence contributed to the loss.

It is respectfully suggested that the isolated authority upon which the Lower Court appears to rest its view, *a view which is even unpopular with Judge Knapp* (28a), is clearly distinguishable from the case before this Court for in the *Ore Carriers of Liberia* case, *supra,* the plaintiff's cause of action sounded *not in tort but in contract* under a charter party agreement in which there was included a warranty that the charterer (defendant) provide a safe berth. The *original, innocent, damaged* claimant was not a party to the suit and, as the Court of Appeals pointed out, the only question was whether one party who paid all of the damages to an innocent claimant is entitled to pre-judgment interest on that portion of a liability for which another is responsible, either in whole or in part. There was no question in the *Ore Carriers* case concerning *the original claimant's fault,* whereas in Wapello had it not been for the plaintiff's negligence the danger could have been avoided (24a). *Triangle Cement Corp.* v. *Towboat Cincinnati, supra.*

Within the opinion of Judge Knapp we find twelve cases cited (29a/30a), which are said to be in support of the Lower Court's finding that pre-judgment interest must be granted. A study of the cited cases, however, demonstrates that they are inapposite to the circumstances present here, clearly distinguishable and, more positively stated, contra to the proposition for which they are cited.

Seven of these cases concern *sole fault* on the part of the defendant, as opposed to mutual fault situations, where it was perfectly proper to award pre-judgment interest. *The President Madison* (9th Cir. 1937), 91 F. 2d 835; *Mid-America Transportation Co., Inc.* v. *Rose Barge Line Inc.* (8th Cir. 1973), 477 F. 2d 914; *Elgin, Joliet & Eastern Railway Co.* v. *American Commercial Line Inc.* (N.D. Ill. 1970), 317 F. Supp. 175; *Mobil Oil Corp.* v. *Tug Pensacola* (5th Cir. 1973), 472 F. 2d 1175; *American Zinc Co.* v. *Foster* (5th Cir. 1971), 441 F. 2d 1100; *Moore-McCormack Lines Inc.* v. *Amirault* (1st Cir. 1953), 202 F. 2d 893; *Frost* v. *Gallup* (D. Rhode Is. 1971), 329 F. Supp. 310. In *Esso International, Inc.* v. *S.S. Captain John* (5th Cir. 1971), 443 F. 2d 1144, an action to recover the cost of fuel and supplies delivered to a vessel, *pre-judgment, interest was disallowed* by the Trial Court and that decision was affirmed by the Fifth Circuit.

While *Algonquin Deep Sea Research Corp.* v. *Perini Corp.* (D. Mass. 1973), 353 F. Supp. 561, and *The Manitoba* (1886), 122 U.S. 97, were indeed mutual fault collision cases, we find that *interest was awarded from the date of the decree* and in *United States* v. *Eastport Steamship Corp.* (S.D.N.Y. 1964), 232 F. Supp. 137 (an action to recover charter hire), pre-judgment interest was denied. Based upon the foregoing analysis, it is difficult to comprehend the area of support which Judge Knapp found in these cases to provoke him to disregard his "innate sense of the fitness of things" (28a), which, if applied, would have led him to decline plaintiff's (appellee's) application for pre-judgment interest.

With the greatest respect, we fail to find in any of the afore-cited cases support of a view contrary to that espoused by Judge Bonsal in *Triangle Cement Corp.* v. *Towboat Cincinnati, supra,* which this Court affirmed, that in a situation where but for the negligence of the plaintiff a casualty would not have occurred, the negligence of the

defendant notwithstanding, "interest commences to run from the date of the final decree" (p. 77) and an award of pre-decree interest is unjustified.

CONCLUSION

The opinion and order of the court below awarding pre-judgment interest to the plaintiff should be reversed.

Respectfully submitted,

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Service of three (3) copies of the within is admitted this 25 day of June 1924

Bergeson Engelgau & Hoorn